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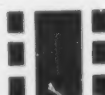
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ABSTRACT

This report represents a natural aftermath to the National Labor Relations Board's 1970 assertion of jurisdiction over private universities and colleges. For the first time, the Board decided that employees of private higher educational institutions had the right to unionize and to bargain collectively with their employer. The so-protected educational institution employee may be a member of the faculty or nonacademic staff. Of paramount importance, the Labor Act grants to employees "the right to self-organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." Highlighted in this document are some of the major problems confronting an educational employer faced with the prospect of a union organizational effort. These comments also contain an explanation of some of the pitfalls that appear in many union organizational settings, and which, if the leap into the pit follows, may constitute an unfair labor practice, or perhaps more importantly, a ground for setting aside a union election on the campus.
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ADMINISTRATORS IN THE PROCESS OF UNIONIZATION

AVOIDING UNFAIR LABOR PRACTICES *

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I. PURPOSE OF THIS REPORT

This report represents a natural aftermath to the National Labor Relations Board's 1970 assertion of jurisdiction over private universities and colleges.¹ For the first time, the Board decided that employees of private higher educational institutions had the right to unionize and to bargain collectively with their employer. The so-protected educational institution "employee" may be a member of the faculty or non-academic staff. Supervisory employees are not entitled to the benefit of the Act.

Of paramount importance, the Labor Act grants to employees (including those of private universities and colleges), "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining..."²

A concomitant feature of the right to self organization is the right of employees to be protected against actions of employers (the educational institution) that interfere with the exercise of the right of employees to organize.

Accordingly, the National Labor Relations Act contains a comprehensive scheme of unfair labor practice provisions that prohibit an employer from unlawfully frustrating the rights of

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* Opinions expressed in this article are those of the authors. The Academic Collective Bargaining Information Service is neutral on the desirability of collective bargaining; its purpose is to disseminate information on collective bargaining in higher education.

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employees to select a labor organization to represent them.³

We here highlight some of the major problems confronting an educational employer faced with the prospect of a union organizational effort. These comments also contain an explanation of some of the pitfalls which appear in many union organizational settings, and which, if the leap into the pit follows, may constitute an unfair labor practice, or perhaps more importantly, a ground for setting aside a union election on the campus. These comments are not meant to be exhaustive, and, if you face an organizational effort, legal counsel should be consulted.

While the emphasis of this report relates to the regulation of conduct of private universities and colleges by the National Labor Relations Board under the National Labor Relations Act, it must be noted that public institutions are not regulated by this Act but by appropriate state legislation, which, in most cases, contains comparable prohibitions against unfair labor practices. If you are a public institution, your local state laws will govern your labor relations. Certainly advice of local counsel is required.

You should know that there are some technical distinctions between what may represent (a) an unfair labor practice and what may represent (b) grounds for setting aside a union election. Specifically, conduct that may form a basis for setting aside the results of a union election may not be sufficiently serious to constitute a statutory unfair labor practice. However, the emphasis in this report is to make administrators aware of the type of conduct that can be cited as grounds for overturning the results of an election in which the employees have elected not to be represented by a labor organization.

There is at present no wealth of reported precedent concerning unfair labor practice litigation involving educational institutions.⁴ Nor are there seemingly any important distinctions to be drawn in the area of employer pre-election conduct between conduct affecting academic employees and conduct affecting non-academic employees.

II. THE LAW

Section 8(a) of the Act provides that it shall be an unfair labor practice for an employer,

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed. . .

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization. . .

(5) to refuse to bargain collectively with the representatives of his employees. . ."

Additionally, in connection with the period preceding a union election, the Board has stated that:

"In election proceedings it is the Board's function to provide a laboratory in which an experiment may be conducted as nearly ideal as possible to determine the uninhibited desires of the employees."

Generally, what the law prohibits in connection with the period preceding a union election is Employer conduct that may be described generically as discriminatory or coercive.

III. THE SETTING

You have received a report that a national faculty union (or a nationally reputed blue collar union) has been actively taking steps to organize your employees. For the most part, the unions active in organizing faculties are the AAUP (American Association of University Professors), NEA (National Education Association) and AFT (American Federation of Teachers), affiliated with AFL-CIO. You may even find your own faculty associations seeking to be recognized as a bargaining agent. As to non-academic employees, the unions active in seeking recognition will be traditionally unions also involved in the industrial sector.

Specifically, from our past experience, the union organizational progress has consisted of the following:

1. Non-employee union organizers have been:
 - (a) passing out handbills on the public road in front of the campus.
 - (b) coming onto the campus to pass out literature in the parking areas.
 - (c) coming into the Student Union and academic buildings and passing out literature.
 - (d) holding off-campus meetings at a local restaurant with the employees.
 - (e) circulating "authorization" cards to employees, which authorize the union to act as the employees' collective bargaining representative.
2. Employees have also been:
 - (a) passing out cards to other employees.
 - (b) grouping together in small meetings in the cafeteria or at work stations and "talking up" the union.

3. The union has requested that the university provide it with data pertaining to the salaries and benefits of employees.

4. The union (or a group of employees) has requested the use of the campus mail system for the purpose of distributing literature to employees, and has submitted articles emphasizing the advantages of unionization to the campus newspaper for publication.

5. The union has written you a letter claiming that a majority of your employees have signed these authorization cards. The union has asked you to check the cards, and has demanded that you recognize the union as the exclusive collective bargaining representative of your employees and negotiate a contract containing provisions for the wages, hours and other terms and conditions of employment.

6. A group of anti-union employees has formed its own independent association and has asked you to deal with the association rather than the national union.

7. The union has filed a petition with the Board, requesting that the Board conduct an election among your employees for the purpose of determining whether a majority of the employees wish to have the union serve as their exclusive collective bargaining representative.

IV. THE UNDERLYING PREMISES

Generally, an institution which is faced with a union organizational effort, consisting of the steps described above, has a right to insist that a Board-conducted secret ballot election be the method utilized for the purpose of determining whether employees desire union representation. This right is normally qualified only by improper employer conduct. Such conduct may lead to a revocation of the right to have the union's claim for recognition resolved by the elective process.

An employer is not by law required to remain silent or to be neutral when faced with a union organizational effort. An employer may opt to campaign affirmatively and aggressively against a union upon the belief that union representation is not in the best interest of the institution or the employees.

Later in this report we comment upon limitations placed upon the employer, the educational institution, in the conduct of the campaign. However in the face of our statement that an employer need not remain silent or be neutral, we outline the broad subject matter to which you may address yourself, depending upon your own labor relations policy.

In the instance of an academic organizational campaign, the basic consideration is whether you wish to adopt a policy of hands off or a pro or con position. The literature is ever-

growing in terms of the question of appropriateness of collective bargaining on the university campus.⁶

Your own staff people should cull out the varying viewpoints among campus and university heads and within the professoriate concerning attitudes on the subject. The wealth of available literature ranges from expressions that collective bargaining is appropriate to the highly critical belief of others that the process is not applicable in a collegial milieu. Even those in top level positions of the AAUP (American Association of University Professors) have for years argued the subject. It was only in May of 1972 that the AAUP, in its New Orleans Annual Meeting, resolved to support local chapters desiring to make use of the collective bargaining process.

The anti-collective bargaining views of those within the professoriate are available not only for shaping an educational institutional policy but for dissemination in the course of a union campaign.

In both the academic and non-academic union campaign, the dialogue between the adherents of collective bargaining and those who oppose the process may very well resemble that which appears in like campaigns in the industrial sector. Typically, there will be the economic arguments concerning comparability of wages and benefits and the criticism of union principles as being too reflective of the Peter Principle. Arguments can be expected concerning the "ability to pay" within the "limited resources", and the never-ending problem of institutional "priorities". To be added to the content of arguments is not only the theoretical question of what happens to pre-existent governance systems, but their legal status in a collective bargaining context.⁸

A full, frank, truthful and factual presentation of the issues to which we have referred is not a violation of the law. There have been many administrators on campuses in this country who have undertaken just such presentations in the course of a union campaign and, in many instances, prior to any threat of a union campaign.

It should also be said that there is no broad sweep of unionism in the area of private higher education. The same cannot be said in the area of public higher education. To date the professoriate in private education has not been widely accepting the trade union principle as the device for settling faculty difficulties.⁹

Thus, with the foregoing comments, we may proceed to the more mechanical problems involved in a campaign.

V. QUESTIONS RAISED BY THE SETTING

1. To what extent can the solicitation of the union be prohibited?

(a) Can the non-employee union organizers be kept off the campus?

(b) Can the employees be prevented from passing out cards and holding meetings on campus?

(c) Should I allow the union access to our campus mail system and campus newspaper?

2. Should I provide the union with data pertaining to salary and benefits?

3. Should I accept the union's challenge and look at the authorization cards to determine whether a majority of our employees have signed them?

4. Should I answer the union's letter demanding recognition? If so, how?

5. Am I permitted to deal with the independent association established by the group of anti-union employees?

6. Assuming that I would prefer to continue operating our institution without a union, wouldn't it be advisable to notify our employees that a "small" wage increase is in the works?

7. Believing that the employees pushing the union are in a department with a large number of employees, or, in the event of non-academic union organizational activity, are working on the day shift, wouldn't it be advisable to transfer these employees to another department, or to the night shift, where their opportunity to spread the union message would be reduced?

8. Is there anything wrong with calling into my office a key employee or two for the purpose of finding out something about the real strength of this union on campus?

9. Is there anything wrong with my grouping all the employees in the auditorium and giving them my views regarding unionization?

VI. HOW TO HANDLE THE SETTING AND THE RESULTANT QUESTIONS.

A. Union Solicitation

In terms of solicitation by non-employee union organizers, it is clear that such organizers have the right to solicit off the employer's premises on public property.

Not so clear is whether private property that is generally open to the public, such as a private college campus, is public in the sense of providing non-employee union organizers with

with the absolute right to solicit on campus. The Supreme Court of the United States has wrestled with this problem in a number of cases dealing with shopping center and retail store parking lots.¹⁰ In the more recent cases the Court has seemed to hold that an employer may bar on-premises solicitation by non-employee organizers where it can be established that the union had other reasonable access to the employees.¹¹

In the case of solicitation by non-employee union organizers the more critical question in connection with educational institutions would seem to be whether other types of organizations or vendors have been permitted to distribute literature or sell products to the employees. If so, then a rule that prohibits by language or effect just the soliciting efforts of union organizers would be considered as unlawful discrimination.

A distinction must be drawn between the soliciting efforts by non-employee union organizers and the efforts by employees who are "pushing" the union.

Generally, an employer may prohibit employees from orally soliciting at times when they are supposed to be working, and may prohibit employees from distributing literature in working areas on the premises. Stated in reverse, employees are permitted to solicit on their non-working time, such as in cafeterias and lounges.

The importance of formulating a valid, non-discriminatory solicitation rule should be underscored. The existence of a discriminatory rule, or the existence of a valid rule which has been applied in a discriminatory manner, is ordinarily an automatic ground for setting aside the results of a union election.

The timing of the promulgation of the solicitation is also important. A rule promulgated one day after a union has filed an election petition with the Board probably minimizes the validity of the rule when the Board is called upon to determine its legality.

B. Providing The Union With Data And Facilities

As quoted earlier, the Act provides that it is an unfair labor practice for an employer to contribute financial or other support to a labor union.

This would have application where the employer provides one union with data pertaining to the wages and benefits of employees before a union election. Such support would minimally constitute conduct that would warrant setting aside an election, if not an unfair labor practice within the meaning of the Act, at least in a case where another union was interested in representing the employees.

The problem becomes acute with respect to colleges and universities due to the historical practice of providing certain faculty organizations with economic data pertaining to the faculty. The problem intensifies when other faculty organizations, or even non-faculty unions such as the Teamsters, Machinists, etc. are refused the same information.

The analogy and rationale would be identical in terms of providing a labor union with access to such facilities as the campus mail system, which would likely constitute unlawful support within the meaning of the unfair labor practice provisions of the Act. In a pre-election setting where there are multiple unions contesting for the right to represent the same employees, offering the mail facilities to one would likely present grounds for upsetting the election.

The analogy can further be extended to campus newspapers. Clearly, a newspaper that is beyond the control and censorship of the educational employer would be a proper forum for the expressions of viewpoints of any labor organization. In terms of the "house organ", i.e., the publication that is typically within the control of the Administration, the proper campaign usage of such a publication becomes less clear. Certainly, the employer would be free to use it in a campaign to express its views. With respect to making the house organ available for use by outside labor organizations, suffice it to say that extending the use of the house organ to one labor organization and denying it to others may constitute unlawful support.

C. The Authorization Cards And Replying To The Union's Demand For Recognition

Stated earlier was the general proposition that an employer has a right when confronted with a union drive to insist that an election be conducted by the Board.

This right becomes something less than absolute when an employer accepts the union's challenge to review and verify the authorization cards. Having done this and having observed that a majority of the employees have in fact signed the cards, the employer runs the risk of providing the union with the opportunity to proceed before the Board and securing a Board order compelling the employer to recognize the union without an election.

Assuming that most employers believe that a secret ballot, government-regulated election is the most equitable way of recording the uninhibited preference of employees, an employer would be well advised not to review the authorization cards. There is no requirement for an employer to review the cards.

Even when not reviewed, the cards do not lose their significance. When an election has been held with the count favoring the employer, but where the employer has been guilty of serious or flagrant pre-election misconduct, the results may

be set aside. The employer may be ordered to recognize the union without a second election in cases where it can be shown that a majority of the employees signed the cards.¹²

The type of conduct that would be considered sufficiently flagrant or serious to warrant this type of result would clearly include discharging known union adherents because of their union activity, or granting a whopping, unscheduled wage increase on the eve of the election.

Where an employer receives a union demand for recognition and a request to review the cards, the employer should reply to the union, acknowledging receipt of the demand for recognition. But if the employer believes that an election is the most appropriate method for resolving the claim, he should suggest to the union his preference for utilizing the Board's elective process.

D. Dealing With The Employees Independent Association

Generally speaking, there is nothing wrong in recognizing a truly independent in-house association as the labor representative of your employees. Of course, this is by no means an answer for an institution which believes that the collective bargaining process is inappropriate for the campus.

This general statement must be qualified under the setting described above. Where another labor organization has expressed an interest in representing your employees, the concurrent or subsequent recognition of an independent in-house association would likely render you vulnerable to charges of unfair labor practices.

In the event that the other labor union has filed a petition, the proper course of action in this situation would be for the in-house association to intervene before the Board, and seek to be added to the election ballot. If no petition has yet been filed, the employer would be permitted to file a petition with the Board, citing the presence of two organizations competing for representation rights.

E. The Stance And Activities Of The Employer

The date of filing of the union's petition for an election represents the cut off date for identifying which conduct of the employer may be considered as a basis for setting aside the results of an election. Improper conduct that occurs subsequent to the filing of the petition may constitute grounds for upsetting an election. (Caveat - There should be no pre-petition complacency since employer conduct that precedes the filing of the petition, while not available as a basis for upsetting the election, still may constitute a remedial unfair labor practice.)

Presumably, the easiest reaction to a union organizational drive is to maintain a stance of pure neutrality, a reaction consisting of advising your employees that you are neither in favor of nor opposed to unionization, and that you welcome the expression of majority preference.

Often, however, employers prefer to continue operations without a union. For those employers the term "campaign" best reflects their reaction to organizational efforts.

Initially, as we have stated, an employer is permitted by law to campaign against a union. This campaign may lawfully take many general forms -- speaking to employees and writing to employees being the most prevalent.

It is not normally the form that places an employer in the position of committing an unfair labor practice or improper pre-election conduct, but rather the substance of what was said or written, where was it said, and who said it.

A significant caveat is that the employer is responsible for the actions of all supervisors during an organizational drive.

As implied earlier, generally includable within the framework of permissible pre-election employer conduct are the following:

(a) Requiring employees during their working time to attend meetings in an auditorium or normal meeting place to hear an employer representative speak to them (except during the 24-hour period preceding the election).

(b) Telling the employees how their wages and benefits compare with other institutions or other businesses.

(c) Explaining to the employees the dues and initiation fees structure of the union.

(d) Providing other factual data pertaining to the union such as the salaries of union officers and strike statistics involving the particular union.

Included within the framework of improper pre-election employer conduct are the following:

(a) Calling employees eligible to vote into your office or another area that by reputation represents the Chambers of Management for the purpose of discussing union activities or sentiment. (An educational administrator must be particularly wary of the positions of employees with whom he is discussing unionization. For example, in a faculty organizational drive an administrator may feel safe in discussing union progress with a department chairman believed by the administrator to be a supervisor, and the Board may later determine that Department Chairmen are not supervisors but rather eligible voters.¹³)

(b) Altering work assignments, denying tenure, or changing the contents of jobs of those employees believed to

be union advocates, for the purpose of discouraging them from their activities on behalf of the union or reducing the impact of their activities.

(c) Promising or granting out-of-pattern improvements in wages or benefits or other terms of employment.

(d) Withholding, or threatening to withhold, any existing benefits, or any improvements that had been announced with specificity prior to the advent of the union.

(e) Telling employees that you would never negotiate with the union even if the election were won by the union.

In summary, the laundry list of permissible pre-election employer conduct and improper employer conduct is extensive, the above detailing merely representing some of the oft-litigated types of conduct. The law defining particular conduct as permissible or impermissible is largely contained in the decisions of the Board. Often the line between what is proper or improper is thinly drawn.

VII. CONCLUSION

We have tried to outline for you the problem areas in the event of an organizational drive. Understandably no one person sitting at the helm of a higher educational institution can be so knowledgeable of labor relations, both in the academic and non-academic sphere, that he may administer a program within the broad outlines to which we have referred.

Even given the fact that our comments may have aroused your interest and served as a warning sign, we submit that it behooves the college and university president to surround himself with knowledgeable people in the field. Many institutions of higher learning have had personnel and industrial directors for non-academics for several years. Some of these incumbents may need training in the fields related to collective bargaining. Certainly, in the academic arena there are very few institutions which have a person whose primary concern is labor relations of faculties.

The reasons for the omission of such a designee are apparent when one reviews the Topsy-like method which has been inherent in the relations between and among administration and faculty members. There have been structures of academic freedom committees, tenure promotion committees, and the like, for several years. Bottomed as these structures are upon the collegial spirit, the determination of peers has often been, for practical purposes, final. There was less need for overall administration, since basically determinations were made within the department, the college and even the board of governance, assemblies, and senate.

Now with the advent of collective bargaining possibilities in both the academic and non-academic arenas, a critical examination must be made of possible impacts. In our judgment inputs for resolutions must come not only from those who are experienced with the systems of the past, but also from the

labor relations expert who is ingenious enough to transfer, without blind application, his industrial sector experience to the campus. We have said elsewhere¹⁴ that such a professional must have many qualities and qualifications and he must be adaptable; but basically a thorough knowledge of the labor relations law is a requirement.

Hopefully, the foregoing outline of the problems will alert you to the limitations involved and the need for positive action.

FOOTNOTES

- ¹ Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970); For additional comments on the Board's initial assertion of jurisdiction see Ferguson, "Private Institutions and the NLRB", Faculty Power: Collective Bargaining on Campus, The Institute of Continuing Legal Education (1972).
- ² Sec. 7, National Labor Relations Act, as amended.
- ³ Sec. 8, National Labor Relations Act, as amended.
- ⁴ Less than a handful of published unfair labor practice cases involving private institutes of higher education have come to our attention. See e.g. Duquesne University, 198 NLRB No. 117, 81 LRRM 1091 (1972); University of Chicago Library, 205 NLRB No. 44, 83 LRRM 1678 (1973).
- ⁵ General Shoe Corp., 77 NLRB No. 124, 21 LRRM 1337 (1948).
- ⁶ See Tice, Faculty Power: Collective Bargaining on Campus, The Institute of Continuing Legal Education (1972); and Tice, Faculty Bargaining in the Seventies, The Institute of Continuing Legal Education (1973). Note particularly the comprehensive bibliographies contained at pp. 331 and 345 respectively in these publications.
- ⁷ Ladd and Lipset, Professors, Unions, and American Higher Education, American Enterprise Institute for Public Policy Research (1973) at p. 16.
- ⁸ Kahn, The NLRB and Higher Education: The Failure of Policy-making Through Adjudication, 21 UCLA L. Rev. (Oct. 1973) at pp. 144-160; Sugarman, Employee Committees: Can They Survive Under the Taft-Hartley Act?, Vol. 24, No. 10 Lab. L.J. (1973) at pp. 684-691.

- 9 Doherty, The National Labor Relations Act and Higher Education: Prospect and Problems, Vol. 4, No. 4 NACUBO, Professional File (Jan. 1973); Ladd and Lipset, supra, at p. 1; Vol. 8, No. 10, The Chronicle of Higher Education (Nov. 26, 1973) at p. 9 et seq.; we have commented elsewhere that the elections at Fordham and Syracuse University, large private educational institutions, did not result in the selection of a union (address before Eastern Association of College and University Business Officers, November 19, 1973); at another large private institution, New York University the results of the election ascertained January 16, 1974 indicated that the UFCT Union lost the election in the broad unit.
- 10 See e.g. Logan Valley Plaza, 391 U.S. 308, 66 LRRM 2209 (1968); Central Hardware Co. v. NLRB, 407 U.S. 539, 80 LRRM 2769 (1972).
- 11 Central Hardware Co. v. NLRB, supra.
- 12 NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).
- 13 Compare Long Island University (C.W. Post), 189 NLRB No. 109, 77 LRRM 1001 (1971); Adelphi University, 79 LRRM 1545 (1972); Syracuse University, 83 LRRM 1373 (1973) with Fordham University, 195 NLRB No. 23, 78 LRRM 1177 (1971); University of Detroit, 193 NLRB No. 95, 78 LRRM 1273 (1971) and New York University, 83 LRRM 1549 (1973). See also Ferguson, "Recent NLRB Decisions", Faculty Bargaining In The Seventies, supra, at p. 47 et. seq.
- 14 Ferguson, Collective Bargaining in Universities and Colleges, 19 Lab. L.J. 778 (1968).

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3. Morris, The Developing Labor Law: The Board, The Courts and The National Labor Relations Act, Bureau of National Affairs (1971).
4. The Non-Union Company: Labor and Other Legal Implications, Practising Law Institute (1970).